KEJURUTERAAN AWAM CANG CENG (M) SDN. BHD.

v.

THE STANDARD CHARTERED BANK

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 86 OF 1990]
21 JUNE 1991

CONTRACT: *Project - Performance bond issued by party who was not party to the project contract - Termination - Injunction against effecting payment under the performance bond - Principles applicable - Whether demand complies with performance bond - Issue of breach is matter between parties to the project.*

The plaintiff K entered into a contract TSH1 with the Government of Sarawak (the employers) for the construction of a bridge (the project). As supplementary to the contract, and at the request of K, the defendant SCB issued a bank guarantee (TSH2) in favour of the employers. The employers decided to terminate the contract and K accepted its repudiation of TSH1. K obtained an interim injunction against the defendant restraining them from effecting any payment under the performance bond until after the trial of this suit or until the publication of the award of the arbitrator or the ruling of a Court of competent jurisdiction in respect of the dispute between the plaintiff and the employers or until further order.

SCB filed an application to set aside the interim injunction and to have the plaintiff's statement of claim struck out under O. 18 r. 19 of the Rules of the High Court 1980.

Held:

[1] K cannot rely on the ground that TSH2 had been wrongfully terminated by the employers for a declaration that the bond was invalid, null and void and/or unenforceable as this issue is not relevant to SCB. Furthermore, the issue of proof of loss or damage by the employers as relied by K has no relevance to SCB as these matters are clearly between the plaintiff and the employer.

[2] As regards the performance bond the Court need only to be satisfied that the demand complies with the terms of the performance bond and the question of whether there is a breach of the bond or otherwise by the employers is a totally different issue in this action.

[Plaintiff's claim struck out with costs.]

Cases referred to:

Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 QB 169 ***(foll)***
United Trading Corp. S.A. and Murray Clayton Ltd. v. Allied Arab Bank Ltd. & Ors. [1985] 2 Lloyd's Rep 554 ***(foll)***
Fellowes & Son v. Fisher [1975] 2 All ER 843 ***(cit)***
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(cit)***
The Brightside Mechanical & Electrical Services Group Ltd. & Anor. v. Standard Chartered Bank & Anor. [1989] 3 MLJ 17 ***(cit)***
Tractors (M) Ltd. v. Tio Chee Hieng [1975] 2 MLJ 1 ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, O. 29 r. 1

Other source referred to:

Mallal's Supreme Court Practice, 2nd Edn.,

For the plaintiff - George Lo; M/s. Nashir, Johal & Co.
For the defendant - Chew Pok Ooi; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Haidar Mohd. Noor J:

The plaintiff entered into a contract with the Government of Sarawak (the employers) for the construction and completion of the Sarikei Bridge at Sarikei (the project) for a total sum of RM5,948,699.48 with a completion period of 26 months. The contract is No. PWD/HO/B47/87 dated 2 May 1987 (Exhibit 'TSH1'). As supplemental to the contract and at the request of the plaintiff, the defendant issued a Bank Guarantee No. 427/87/163 dated 19 June 1987 (Exhibit 'TSH2') in favour of the employers.

In the present suit the plaintiff claims *inter alia*:

1. A declaration that TSH2 is invalid, null and void and/or unenforceable.
2. Alternatively, a declaration that it is conditional upon the plaintiff having defaulted or breached the contract and further conditional upon proof of actual loss or damage by the employers.
3. Further and in the alternative, a declaration that any liability thereon is subject to a deduction by a tribunal of competent jurisdiction.
4. An order that the defendant be restrained whether by themselves or their servants or agents or otherwise from effecting any payment under TSH2 until after the publication of the award of an arbitrator or the ruling of a Court of competent jurisdiction in respect of the dispute between the plaintiff and the employers.

From the facts as disclosed in the statement of claim it would seem that the plaintiff claimed that it had not defaulted in its obligations under TSH1 and that the employers were aware that at all material times the plaintiff has been ready and willing to undertake all works instructed by the consultant subject to confirmation of approval by the employers and further that the employers were aware that the project was stopped because they failed to approve the variations which their consultants made to the original designs. It is further alleged that the employers gave notice to the plaintiff that they had decided to determine TSH1 without compliance with cl. 30(a) thereof. It seemed that the employers at a meeting at the office of the State Financial Secretary on 19 May 1990 in which the plaintiff's representatives and the representatives of the consultant and the Jabatan Kerja Raya attended, oral notice was given that the employers decided to determine TSH1 and to call for fresh tender. In the circumstances the plaintiff treated the employers as having repudiated TSH1. The plaintiff then wrote a letter dated 24 May 1990 to the Director of Jabatan Kerja Raya to inform the employers that the plaintiff accepted their repudiation of TSH1 and further gave notice that the plaintiff will be submitting its claims relating to TSH1 and the project in due course.

On 31 May 1990, the plaintiff filed an *ex parte* summons in chambers under O. 29 r. 1 of the Rules of the High Court 1980 (RHC) for an interim injunction to restrain the defendant whether by themselves or their servants or agents or otherwise from effecting payment under TSH2 until after the trial of this suit or until the publication of the award of the arbitrator or the ruling of a Court of competent jurisdiction in respect of the dispute between the plaintiff and the employers or until further order. On 7 June 1990 I granted the interim injunction with the usual undertakings as to damages.

On 3 November 1990 the defendant filed a summons in chambers seeking an order that:

(a) the interim injunction granted on 7 June 1990 be discharged and set aside on the ground that the said order was wrong in law and in the circumstances of the case;

(b) the writ of summons and statement of claim in this action be struck out under O. 18 r. 19 of RHC under the inherent jurisdiction of the Court.

It is supported by the affidavit of one Cheng Ah Teck, the branch manager of the defendant.

The plaintiff opposed the summons in chambers of the defendant through the affidavits of Ting Kah Hung, its executive director (encls. 25 and 31) and the affidavit of George Lo Kim Fah, its Counsel (encl. 26).

(a) *The application to discharge and set aside the interim injunction order dated 7 June 1990.*

It would appear to me that the principal ground advanced by the plaintiff in the application for interim injunction was because the plaintiff had not committed any breach of TSH1 entered into between the plaintiff and the employers. The defendant is not a party to TSH1. The defendant executed TSH2 with the employers at the request of the plaintiff. TSH2 is in fact a performance bond. Nowhere in the statement of claim filed is the plaintiff asserting fraud in this suit or in the application for interim injunction. In that event I have to confine myself strictly to the terms as embodied in TSH2 to see whether the interim injunction was rightly granted by me earlier or not.

Lord Denning MR in *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] 1 QB 169 stated the law as to performance bond, thus:

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. *Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit ...*
>
> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which *gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, or demand, if so stipulated, without proof or conditions.* The only exception is when there is clear fraud of which the bank has notice. (Emphasis is mine)

In *United Trading Corp. S.A. and Murray Clayton Ltd. v. Allied Arab Bank Ltd. & Ors.* [1985] 2 Lloyd's Rep. 554 Lord Justice Ackner said:

> *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] 1 Lloyd's Rep. 166; [1978] 1 QB 159, is of course the *locus classicus* for the proposition that a performance bond, standing on a similar footing to a letter of credit, obliges a bank to honour it according to its terms, unless it has notice of clear fraud committed by the beneficiary.

The beneficiary here is the employers and there has been, as I said earlier, no allegation of fraud committed by the employers.

Based on the authorities cited above, it seems clear to me that even if the plaintiff's allegation that TSH1 was wrongly terminated by the employers, then it is a matter for the two parties to resolve the matter which the plaintiff did by filing an action against the Government of

the State of Sarawak *vide* Suit No. Kg. 133 of 1990. It is to be noted that in Suit No. Kg. 133 of 1990 the plaintiff is seeking *inter alia*, for a similar declaration as in this suit in respect of TSH2.

The legal obligations imposed by TSH2 on the defendant is clear as by cl. 2 thereof the defendant (as a guarantor):

> ...shall pay to the Government (that is, Government of Sarawak) on demand such sums as the government may certify being indemnification against any loss, damage, costs or expenses incurred by the government by reason of any default or breach on the part of the contractor (that is, the plaintiff) of his obligations under the contract (that is, TSH1) provided always that the total of such sums so demanded shall not exceed the sum of RM297,434.97 ....

The issue of the employers proving actual loss or damage for the purpose of invoking the terms of TSH2 as alleged by the plaintiff does not arise here as in my view, the terms as set out in TSH2 are clear, that is, the employers need only to issue notice of demand on such sums as the employers may certify not exceeding RM297,434.97 (see *Edward Owen Engineering Ltd.'s* case at p. 169). Clearly, in my view, there are really no grounds for the continuation of the interim injunction order against the defendant.

Sir John Pennycuick in *Fellowes & Son v. Fisher* [1975] 2 All ER at p. 843 clearly sets out the principles in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 in respect of the granting of an injunction or otherwise. Mr. George Lo, Counsel for the plaintiff, submitted that if payment is made under TSH2 the plaintiff would suffer irreparable damage in that the plaintiff would not be able to secure the guarantees and other credit facilities from other banks. The plaintiff also alleged that as a result of the call on TSH2 the defendant stopped all credit facilities to the plaintiff. In respect of the alleged action of the defendant I am of the view that even if it is true, it is a matter for the discretion of the defendant to withdraw the credit facilities to the plaintiff based on its view of the plaintiff's conduct and financial position. If the withdrawal is wrong it is for the plaintiff to take action against the defendant and so far as I know no such action has been taken. In respect of the allegation that the plaintiff may not be able to secure guarantees and other credit facilities from other banks, it seems to me that such allegation is not true as by para. 9 of the affidavit of Ting Kah Hung, the executive director of the plaintiff (encl. 25), the plaintiff got the facilities from MUI Bank though on 100% cash margin. In this respect, this is what Lord Ackner said in *United Trading v. Allied Arab Bank* [1985] 2 Lloyd's Rep. at p. 565:

> However, even given the injunctions they seek, they are bound to experience difficulties in raising further sums from their own bank or from other banks to whom they would have to disclose their potential liabilities arising from the performance bonds issued on their instructions.

To quote Chan Sek Keong J in *The Brightside Mechanical and Electrical Services Group Ltd. & Anor. v. Standard Chartered Bank & Anor.* [1989] 3 MLJ p. 17:

> ...the legal position between the defendant (as the guarantor) and the account party (the plaintiff) in a situation where the account party seeks to restrain the defendant from paying on its guarantee, whether on the ground of fraud or otherwise, is set out with great clarity by Ackner LJ (as he then was) in *United Trading, supra*, at p. 565:
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> In *Harbottle Ltd. v. The National Westminister Bank* [1978] QB 146 at p. 155 Mr. Justice Kerr said:
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> > The plaintiffs then still face what seems to me to be an insuperable difficulty. They are seeking to prevent the bank from paying and debiting their account. It must then follow that if the bank pays and debits the plaintiffs' account, it

> is either entitled to do so or not entitled to do so. To do so would either be in accordance with the bank's contract with the plaintiffs or a breach of it. If it is in accordance with the contract, then the plaintiffs have no cause of action against the bank and, as it seems to me, no possible basis for an injunction against it. Alternatively, if the threatened payment is in breach of contract, which the plaintiffs' writs do not even allege and as to which they claim no declaratory relief, then the plaintiffs would have good claims for damages against the bank. In that event the injunctions would be inappropriate, because they interfere with the bank's obligations to the Egyptian banks, because they might cause greater damage to the bank than the plaintiffs could pay on their undertaking as to damages, and because the plaintiffs would then have an adequate remedy in damages. The balance of convenience would in that event be hopelessly weighted against the plaintiffs.

As was said by Chan Sek Keong J in *The Brightside Mechanical and Electrical Services Group Ltd.'s* case at p. 19:

> But, as Ackner LJ has said, the debit is either valid or invalid. If it is invalid, he does not need an injunction. He simply refuses to reimburse the bank or recognise the validity of the debit.

What is needed here is that the Court must be satisfied that the demand complies strictly with the terms of the guarantee (TSH2) and the question of whether there is a breach of TSH1 or otherwise by the employers is a totally different issue in this action. This is a matter, as I said earlier, between the plaintiff and the employers and has nothing to do with the defendant.

In the circumstances I am more than satisfied that the balance of convenience hopelessly is weighted against the plaintiff and I order the interim injunction granted earlier by me be set aside. Damages are to be assessed by the Senior Assistant Registrar on the date to be fixed.

(b) *Application under O. 18 r. 19 of RHC*

Under this rule the Court has the power in a summary manner, that is, without trial, to dismiss the action where the pleading discloses no reasonable cause of action or is scandalous, frivolous or vexatious or it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the Court (see *Mallal's Supreme Court Practice*, 2nd Edn., at p. 219). I am also conscious that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power (see *Tractors (M) Ltd. v. Tio Chee Hieng* [1975] 2 MLJ 1). Thus it is only in plain and obvious cases that recourse should be had to the summary procedure under this rule.

It is therefore appropriate for me to examine the prayers sought by the plaintiff to see whether a reasonable cause of action is disclosed in the pleading or is it otherwise as asserted by the defendant in its application.

Prayer 1

The declaration in prayer 1 is based on the claim in para. 42 of the statement of claim. It is purely on the basis that TSH2 is supplemental to TSH1 which has been wrongfully terminated by the employers. The allegation of wrongful termination of TSH1 is entirely a matter between the plaintiff and the employers and has nothing to do with the defendant who is not even a party to TSH1 and has no knowledge of the facts of the dispute. The defendant merely has to act according to the terms of TSH2 and if the employers satisfy the requirements of TSH2, the defendant has no choice but to comply therewith. There is therefore no basis for the plaintiff to rely on this ground for a declaration that TSH2 is invalid, null and void and/or unenforceable.

Prayer 2

This prayer is based on prayer 43 of the statement of claim. Again here to say that TSH2 can only be enforced conditionally upon the plaintiff having defaulted or breached TSH1 and further upon proof of actual loss or damage by the employers is without merit. The issue whether the plaintiff has defaulted or breached TSH1 is a matter entirely between the plaintiff and the employers and has nothing to do with the defendant as a guarantor within the terms of TSH2 as between the defendant and the employers. Clause 2 of TSH2 is clear, that is, the defendant

> shall pay to the Government on demand such sum as the government may certify.

Therefore the issue of proof of actual loss or damage by the employers does not arise at all.

Prayer 3

This prayer is based on para 44 of the statement of claim. It would appear that it is based on the wordings of cl. 1 of TSH2. Clause 1 would seem to indicate that **unless there is an existing deduction of a tribunal of competent jurisdiction relieving the plaintiff from performance of TSH1** then the defendant is obligated to indemnify the employers in a sum not exceeding RM297,434.97 if the plaintiff shall in any respect fail to execute TSH1 or commit any breach of obligations thereunder. There is no evidence of such a fact. The words in bracket "unless relieved ..." appear to be in the past tense.

In any event the prayer in this suit seeking a declaration in respect of TSH2 is similarly prayed in suit no. Kg. 133 of 1990 between the plaintiff and the employers and is clearly a duplication though the defendants in this suit and that suit may be different but the end result is the same. The plaintiff as plaintiff in suit no. Kg. 133 of 1990 also prayed for damages and in the event it succeeds the plaintiff would be adequately compensated by the employers as defendant.

For the reasons set out by me I am of the view that the plaintiff's action and statement of claim clearly discloses no reasonable cause of action, and is scandalous, frivolous and vexatious and an abuse of the process of the Court and I accordingly strike it out with costs.

Also found at [1991] 3 CLJ 2502